In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 394

CULLEN HUCKABY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted and sentenced on four counts charging unlawful possession of a still, the possession and fermentation of mash, unlawful possession of distilled spirits, and working in an unregistered distillery.[1]

[1] 26 U.S.C. 5179(a), 5205(a)(2), and 5222(a)(1), 5601(a)(1), and (7), 5604(a)(1), and 5681(c). Petitioner was acquitted on counts charging unlawful use of a still in a dwelling house and the production of distilled spirits.

While his appeal was pending he filed in the district court a motion for a new trial on the ground of newly discovered evidence, alleging, *inter alia*, governmental wiretapping with respect to the present case. Following a hearing, the district court denied the motion, finding the testimony concerning the putative wiretapping "fantastic." The appeal then proceeded; the court of appeals affirmed by order both the conviction and the denial of the motion for new trial (Pet. 6a).

Petitioner here raises only the question of electronic surveillance, which he alleges provided the impetus to the investigation in this case.

The investigation itself appears to have been straightforward. Agents of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service testified at trial that they were investigating an alleged illicit distillery at petitioner's premises between October 30 and November 10, 1964 (R. A. 1b).[2] On two occasions during the evening of November 6, 1964, and once on November 8, agents walking on a sidewalk fifteen to twenty feet from petitioner's front door detected the odor of fermenting whiskey mash (R. A. 3b-4b, 17b-18b). During this time, agents also observed petitioner and another engaged in activities (*e.g.*, the carrying of large bales of sugar and sacks apparently containing five-gallon jugs) which indicated that they were fermenting mash (R. A. 5b-11b). On the basis of these observations, the agents obtained a search warrant. Upon executing it, they

[2] "R.A.," petitioner's designation, refers to the government's appendix in the court of appeals, a copy of which is on file with the Clerk of this Court.

found in the attic three 220 gallon vats containing, at the time of the search, approximately 200 gallons of mash (R. A. 12b, 35b).

The agents did not disclose how they received the information which caused them to initiate the investigation.[3] The burden of the motion for new trial was that governmental wiretapping had taken place in October 1964, and was the source of this information. At the hearing, the claim proved to be based on assertions (1) that airport weather records showed wind direction and velocity negating the claim of the agents that they smelled mash; and (2) that, as shown in part by loose nuts found in petitioner's telephone terminal, a wiretap had been functioning on petitioner's telephone in October 1967, three years after the events leading to the instant prosecution. It was stipulated that, if called, petitioner's brother would testify that he had talked to another by telephone about the operation of the still at least once a day during October and November 1964 (Tr. 70-71).[4]

In an oral opinion rendered at the conclusion of the hearing, the trial court denied the motion for a new trial with the following statement (Tr. 85-86):

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[3] The affidavit of Agent Turner in support of a search warrant, recites in part that "On October 16, 1964 [he] received reliable information that an illicit distillery was being operated at a dwelling type house located at 289 Josephine Street, Detroit, Michigan" (Tr. 78).

[4] "Tr." refers to the transcript of the hearing relating to petitioner's motion for a new trial on grounds of newly discovered evidence. We are lodging a copy of this transcript with the Clerk of this Court.

Well, gentlemen, the motion for [a] new trial on the grounds of newly discovered evidence is a misnomer. There is no newly discovered evidence here.

As a matter of fact, there is very little that even qualified as evidence. Certainly the testimony of the expert witness is far from persuasive; the fact that there were certain wind currents out at the airport at a certain time of course doesn't mean that there could not have been variations in this area, local, transient. As a matter of fact, the witness wouldn't say that there couldn't be, obviously since he was sworn to tell the truth.

The whole point about what the wind was a couple of years later, and his substance he put on the porch is completely unpersuasive. We don't know anything about the conditions that existed at the time that this search warrant was made out other than the agents say they smelled it, and I find them not impeached in any way.

Certainly there is nothing newly discovered here.

The testimony about the wire tap is equally fantastic. To argue from the fact that there was a wire tap at this house at some recent time that there was a couple of years before, based in turn upon the testimony about the wind here, is getting into the realm of fantasy.

There is no evidence of any kind that would warrant a holding that there had been anything improper here in this case.

At the hearing, the Director of the Detroit District of the Internal Revenue Service and the Assistant Special Agent of the F.B.I. in charge of the Detroit

Office testified that they had no knowledge or records of any wiretap installed at petitioner's premises between September 1964 and October 1967 (Tr. 21-23). The Chief Special Investigator of the Alcohol and Tobacco Tax Division of the Treasury Department testified that he had no information of any electronic surveillance or wiretap on petitioner's lines or premises during September-November 1964 or October 1967 (Tr. 28, 31). Additionally, the Department of Justice, in accordance with its representation to the Court in *Schipani* v. *United States*, 385 U.S. 372 (No. 504, O.T. 1966), has undertaken to determine whether there was any electronic surveilance employed or utilized by the government in this case; it has found no indication that any such device was employed.[5]

Petitioner's arguments are based wholly on speculation. His suggestion, that the government be required to prove that anonymous or undisclosed sources of information leading to successful criminal investigations are "legal," is without merit.

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[5] There is also no evidence in support of petitioner's accusation (Pet. 4) that government agents indulged in selective destruction of records to conceal unlawful activity in this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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